

LETTER OPINION
99-L-71

August 6, 1999

The Honorable Wayne Stenehjem
State Senator
PO Box 6352
Grand Forks, ND 58206-6352

Dear Senator Stenehjem:

Thank you for your recent letter asking whether clerks of district court are subject to the criminal history records provisions of N.D.C.C. §§ 12-60-16.1 through 12-60-16.10.

You state that an informal procedure was recently received by some clerks of district court which states or implies that clerks of district court are precluded from releasing criminal record information except to entities identified in N.D.C.C. § 12-60-16.5. Your letter asks four questions regarding the application of N.D.C.C. §§ 12-60-16.1 through 12-60-16.10. For reasons further discussed in this letter, the short answer to your inquiry is that the courts of this state, including the clerks of district court, are not subject to the requirements and restrictions of N.D.C.C. §§ 12-60-16.1 through 12-60-16.10 because they are not "criminal justice agencies."

Similar issues arose in 1987 after adoption of N.D.C.C. §§ 12-60-16.1 through 12-60-16.10. In response to inquiries from the Supreme Court, Attorney General Nicholas J. Spaeth, in a November 17, 1987, letter to William G. Bohn, court administrator for the North Dakota Supreme Court, concluded that these sections do not apply to records maintained by the courts. I have enclosed a copy of the November 17, 1987, letter.

N.D.C.C. § 12-60-16.1(3) defines "criminal history record information" as including information collected by criminal justice agencies. The term "criminal justice agency" is defined in N.D.C.C. § 12-60-16.1(4) as:

any government law enforcement agency or entity authorized by law to provide information regarding, or to exercise

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the powers of, arrest, detention, prosecution, correctional supervision, rehabilitation, or release of persons suspected in, charged with, or convicted of, a crime.

The term "court" is separately defined in N.D.C.C. § 12-60-16.1(2) and is not included in the definition of "criminal justice agency."

As noted in the November 17, 1987, letter, the only obligation which may be imposed upon a court under the criminal history record law is ordering of fingerprints of an offender after sentencing if the offender has not been previously fingerprinted. N.D.C.C. § 12-60-16.2(3). Other than this provision, all duties and responsibilities for reporting offenses to be made part of a criminal history record of an offender are placed upon criminal justice agencies.

"Management of judicial records . . . is an inherent power of a court." 1994 N.D. Op. Att'y Gen. 76, 77.

The clerk of court does not have independent authority to decide questions of access to court records, but acts as an adjunct to the judge. The clerk of court is not a judicial officer, but is part of the judicial branch of government. 15 Am. Jur.2d Clerks of Court § 1. While the clerk of district court is required to "[t]ake charge of all papers and records, which are filed or deposited in the office of the clerk of court, and safely keep and dispose of the same according to supreme court rule", N.D.C.C. § 11-17-01(1), and "[k]eep other records and perform other duties as the supreme court directs by rule." N.D.C.C. § 11-17-01(10), the clerk does not have independent authority to determine whether records may be disclosed.

Id. at 78 (footnote omitted). In response to your first question, it is my opinion that a clerk of district court is an adjunct of the district court and, when acting in that capacity, is not a "criminal justice agency" for the reasons discussed in former Attorney General Spaeth's letter of November 17, 1987. This conclusion makes it unnecessary to answer your second and fourth questions.

Your third question asks whether N.D.C.C. §§ 12-60-16.1 through 12-60-16.10 establish the Bureau of Criminal Investigation as the exclusive source of criminal record information. "Only the bureau [of criminal investigation] may disseminate criminal history record

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information to parties described in section 12-60-16.5." N.D.C.C. § 12-60-16.6. Thus, unless a person requesting "criminal history record information" is listed in N.D.C.C. § 12-60-16.5, it is my opinion that the Bureau of Criminal Investigation is the exclusive source of "criminal history record information" as that term is defined in N.D.C.C. § 12-60-16.1. 1994 N.D. Op. Att'y Gen. L-311 (Nov. 10 letter to Mattson).

However, the result of my answer to your first question, as a practical matter, is that individuals may be able to obtain information from a clerk of district court which is similar to "criminal history information" maintained by the Bureau of Criminal Investigation. It is important to distinguish between the release of "criminal history information" as a compilation maintained by the Bureau of Criminal Investigation and the release of source documents which may be located in offices of clerks of court or criminal justice agencies throughout the state.

Under N.D.C.C. §§ 12-60-16.1 through 12-60-16.10, a criminal history record is a compilation of reportable events reported to this office pursuant to prescribed forms and procedures. This criminal history record would most commonly be referred to as a "rap sheet." Criminal history record information is information which may have been derived from court records but does not include the actual court records themselves. It should be noted that the prosecuting attorney, and not the court, having jurisdiction over a reportable offense must furnish the Bureau of Criminal Investigation with all dispositions of criminal cases for which the Bureau has a record of an arrest or record of fingerprints reported as required by law. N.D.C.C. § 12-60-16.2(4).

Although a criminal justice agency would be prohibited from releasing a "rap sheet" on an offender, N.D.C.C. §§ 12-60-16.1 through 12-60-16.10 would not prohibit that same agency from releasing, pursuant to an open records request or other provisions of law, copies of the underlying documents which may include the initial arrest report, any investigation reports, and notations regarding what occurred upon completion of the investigation. Such release may be subject, however, to other statutory provisions which restrict access to all or a part of the criminal justice agency's own records relating to reportable events. Examples of such exceptions would be N.D.C.C. ch. 27-20 (the juvenile court law), laws relating to the identity of child victims or witnesses (N.D.C.C. § 12.1-35-03), laws pertaining to the portion of a motor vehicle accident report in which a law enforcement officer expresses an opinion regarding the cause of an accident (N.D.C.C. § 39-08-13) and laws relating to confidential

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informants or undercover officers and active criminal investigative or intelligence information (N.D.C.C. §§ 44-04-18.3 and 44-04-18.7).

Enclosed is a 1992 letter from Attorney General Spaeth in which he discussed in more detail the difference between "criminal history record information" as a compilation and the source documents maintained by a local law enforcement agency. Letter from Attorney General Nicholas Spaeth to Donald Rudnick (June 16, 1992). For your information, in the related context of copying charges for public records, the North Dakota Supreme Court recently held that a specific statutory fee for a motor vehicle abstract, which is a compilation of other records and information, does not apply to a request for the source documents from which an abstract is compiled. Robot Aided Mfg., Inc. v. North Dakota Dep't of Transp., 589 N.W.2d 187 (N.D. 1999).

The only issue that may arise pertaining to possible conflicts with N.D.C.C. §§ 12-60-16.1 through 12-60-16.10 and records held by the clerks of district court would be if court records included criminal history record information, i.e., a rap sheet, of an offender. The principal reason that the criminal history information provisions are present in our law is to insure that criminal justice agencies and courts receive accurate information regarding a person's criminal record. In addition, certain restrictions are established for the types of information which may be disclosed to a person other than a criminal justice agency. See N.D.C.C. § 12-60-16.6. Although court records are not within the purview of N.D.C.C. §§ 12-60-16.1 through 12-60-16.10, disclosure of a "rap sheet" as a part of the court's records may result in a person who is not a criminal justice agency receiving more criminal history record information than what that person could have received after making a proper request to the Bureau of Criminal Investigation. This is a matter, however, which I believe could be addressed by the judiciary and the clerks of the district court as a part of their continuing review of court policies and procedures relating to court records.

Sincerely,

Heidi Heitkamp
Attorney General

rpb/jcf/vkk